

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

APR 30 2008

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2007-0313-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
LEON TIMBERLAKE,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-66017

Honorable John S. Leonardo, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Leon Timberlake

Tucson
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Petitioner Leon Timberlake was convicted after a jury trial of first-degree murder, first-degree burglary, aggravated assault, and six counts of kidnapping. This court affirmed his convictions and sentences on appeal. *State v. Timberlake*, No. 2 CA-CR

2000-0202 (memorandum decision filed June 21, 2001). Before this proceeding, Timberlake has apparently sought post-conviction relief three times pursuant to Rule 32, Ariz. R. Crim. P. The trial court dismissed all proceedings and denied relief, but Timberlake only sought review of one of those proceedings. This court granted review of the petition but denied relief. *State v. Timberlake*, No. 2 CA-CR 2005-0008-PR (decision order filed Aug. 30, 2005). In this petition for review, Timberlake challenges the trial court's order dismissing what the court referred to as his fourth notice of post-conviction relief. Absent an abuse by the trial court of the discretion with which it is vested to determine whether to grant post-conviction relief, we will not disturb its ruling. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶2 In dismissing the notice, the trial court first pointed out that this was the fourth post-conviction proceeding that Timberlake had initiated pursuant to Rule 32. As the court correctly noted, in his notice Timberlake “attempt[ed]” to raise claims pursuant to Rule 32.1(d), (e), (f), (g), or (h), which are not subject to the time limits imposed in Rule 32.4 nor subject to preclusion under Rule 32.2. But the court was similarly correct when it observed that a petitioner who intends to raise claims in a successive petition “must set forth [in the notice] the substance of the specific exception and the reasons for not raising the claim in the previous petition or in a timely manner.” Ariz. R. Crim. P. 32.2(b). The rule further provides that, “[i]f the specific exception and meritorious reasons do not appear substantiating the claim and indicating why the claim was not stated in the previous petition

or in a timely manner, the notice shall be summarily dismissed.” *Id.* Finding Timberlake did not set forth “meritorious” reasons why he had failed to raise the claims in previous proceedings, the court dismissed the notice.

¶3 Timberlake has failed on review to sustain his burden of establishing the trial court abused its discretion. Presumably referring to the dismissal of the notice, Timberlake maintains the court denied him access to the courts, in violation of his rights under the First Amendment of the federal constitution. But Timberlake was not denied access to the courts. *See generally Lewis v. Casey*, 518 U.S. 343, 350-51 (1996) (discussing scope of prison inmate’s right to meaningful access to courts). That procedural rules limit the kinds of claims a defendant may raise in a successive post-conviction proceeding does not amount to a denial of access to the courts, as Timberlake seems to suggest. Had he satisfied the requirements of the rule and established why he should be permitted to raise claims he had failed to raise in previous proceedings, the court would have allowed the case to proceed.

¶4 Timberlake has also claimed on review that he does not have access to a law library and therefore could not adequately present the claims. But, even assuming he had no such access, that did not excuse his failure to comply with Rule 32.2(b). Moreover, because he raises this claim for the first time on review, he is not entitled to relief. *See generally* Ariz. R. Crim. P. 32.9.

¶5 Nor has Timberlake established the trial court otherwise abused its discretion by dismissing his notice. He contends the court “prevented [him] from explaining and

proving his issues. That violates hi[s] being able to appeal.” The rule, however, is clear: a defendant may raise in an untimely or subsequent petition claims that are excepted from the rule of preclusion only if he or she makes clear in the notice itself the reasons why he did not raise them previously. Timberlake has had an appeal and, it appears, three previous post-conviction proceedings. In his latest notice, Timberlake indicated he intended to raise claims of newly discovered evidence and actual innocence. *See* Ariz. R. Crim. P. 32.1(e), (h). He provided no details of how his claims fell within these categories. Indeed, most of the claims, which he listed generally, appear not to fall within these categories. Moreover, nowhere in his notice did he explain why he had raised none of the claims on appeal or in the previous proceedings he had brought pursuant to Rule 32, notwithstanding that the form notice he used called for the explanation. His statement that he had found someone with legal training still does not constitute the explanation required by Rule 32.2(b).

¶6 Because Timberlake has not established the trial court abused its discretion when it dismissed his notice of post-conviction relief, we grant the petition for review but deny relief.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

GARYE L. VÁSQUEZ, Judge